In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 984

FELIX FERINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A45–A53) is reported at 340 F. 2d 837. The opinion of the district court (Pet. App. A38–A44) is unreported. The prior opinion of the court of appeals affirming petitioner's conviction is reported at 302 F. 2d 95.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1965. The petition for a writ of certiorari was filed on March 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

772-823—65

QUESTIONS PRESENTED

1. Whether petitioner's trial and conviction in a federal court for obstruction of justice by assaulting a witness after his acquittal in State proceedings on a charge of felonious assault with intent to kill such witness constituted double jeopardy.

2. Whether petitioner's federal prosecution was barred by collateral estoppel.

3. Whether petitioner could be sentenced to consecutive prison terms for conspiracy and for the substantive offense committed pursuant to the conspiracy.

STATEMENT

In April 1961, petitioner and Anthony Cardarella were convicted in the United States District Court for the Western District of Missouri on two counts of obstruction of justice and one count of conspiracy to commit that offense. Petitioner was given concurrent five-year sentences on the substantive counts and a sentence of five years' imprisonment on the conspiracy count to be served consecutively to the sentence on the substantive counts (Pet. App. 9A–10A). The judgment of conviction was affirmed on appeal (302 F. 2d 95), and this Court denied a petition for a writ of certiorari (*sub nom. Cardarella* v. *United States*, 371 U.S. 819). Thereafter, petitioner brought this motion under 28 U.S.C. 2255 and Rule 35, F.R. Crim. P., to vacate or correct his sentence. The motion was denied by the district court (Pet. A38–A44), and the court of appeals affirmed (Pet. A45–A53). The underlying facts may be summarized as follows:

Petitioner and Cardarella were charged in the substantive counts with injuring one Kenneth Bruce

Sheetz on account of Sheetz's testimony before a United States grand jury and with endeavoring to influence, intimidate and impede Sheetz in his capacity as a witness in the district court (Pet. App. A5–A6). The conspiracy count charged them and two others with conspiracy to commit these offenses (Pet. App. A7–A8). The indictment alleged that Cardarella and petitioner had broken into Sheetz's house and that Cardarella shot Sheetz with the intention of "injuring and killing" him (Pet. App. A8).

After the federal indictment was filed, petitioner and Cardarella were charged in State informations with felonious assault with intent to kill (Pet. A55–A56). The State charge against petitioner was tried before the trial on the federal indictment. The first State trial against petitioner resulted in a hung jury, and on retrial petitioner was acquitted (see 302 F. 2d at 108).[1] Petitioner did not assert any double jeopardy claim at his federal trial until his post-trial motions. No double jeopardy claim was raised on his direct appeal from his conviction (Pet. App. A46; 340 F. 2d at 838).

ARGUMENT

1. Petitioner's initial contention is that the federal prosecution after his acquittal on a State charge involving the same acts constituted double jeopardy within the meaning of the Fifth Amendment. This argument was definitively rejected in *Abbate* v. *United States*, 359 U.S. 187. There is no reason for this Court now to reconsider that decision—which was, in

[1] Only petitioner was tried by the State. The information against Cardarella was dismissed after his conviction on the federal indictment. See 302 F. 2d at 109.

turn, based upon a long line of earlier cases (359 U.S. at 190–194) and on an evaluation of the policy considerations underlying the established rule (359 U.S. at 195–196). This is particularly true in light of the fact that the double jeopardy claim here was first raised after trial. See *Barker* v. *Ohio,* 328 F. 2d 582, 584 (C.A. 6); *Harris* v. *United States,* 237 F. 2d 274, 277 (C.A. 8); *Morlan* v. *United States,* 230 F. 2d 30, 32 (C.A. 10), and was then abandoned on petitioner's direct appeal. Compare *McGann* v. *United States,* 261 F. 2d 956, 958 (C.A. 4); *Burns* v. *United States,* 229 F. 2d 87, 89 (C.A. 8), certiorari denied, 351 U.S. 910.

There is no merit to petitioner's suggestion that the decisions in *Malloy* v. *Hogan,* 378 U.S. 1, and *Murphy v. Waterfront Commission,* 378 U.S. 52, have "eroded" (Pet. 16) the foundation on which *Abbate* rests. In the *Murphy* case, this Court held only that the policy underlying the privilege against self-incrimination forbade one jurisdiction from compelling testimony which might incriminate the witness in another jurisdiction; it did not, as petitioner contends, invalidate the "separate sovereignty" doctrine.

Nor does the record support the claim that the State prosecution here was so controlled by the federal authorities that it "was in actuality a * * * federal prosecution." *Bartkus* v. *Illinois,* 359 U.S. 121, 168 (Brennan, J., dissenting) (see Pet. 6–9). The fact that the witnesses in the federal and State proceedings were the same or that federal and State law-enforcement officers cooperated in investigating the crime does not establish that federal agents "engi-

neered" or "controlled" the State trial. And petitioner has cited no other evidence to support the bare allegation that the "State Court trial [was used] as a dress rehearsal and witness training exercise" (Pet. 7).

2. The federal prosecution was not barred by collateral estoppel. The prosecuting parties were different in the two trials and the necessary elements of the offenses differed. Identity of parties is required if the doctrine is to apply, *Hoag* v. *New Jersey,* 356 U.S. 464, 470–471; *United States* v. *Kramer,* 289 F. 2d 909, 913 (C.A. 2), and the parties here were clearly not the same. And since acquittal of the State offense would have been proper if the jury had failed to find sufficient evidence of intent to kill—an element which was not required to establish the federal offense—the acquittal on the State charge did not determine whether petitioner was guilty of the federal offense.

United States v. *Mason,* 213 U.S. 115 (on which petitioner relies), did not establish a general rule of collateral estoppel between State and federal prosecutions. *Mason* dealt with a statute (since repealed) under which sentence for violation of a federal statute, if such violation involved concurrent commission of a State offense, was governed by the punishment provided by the State for commission of that offense. Prior acquittal in a State prosecution was held to bar imposition by the federal court of the State penalty. That decision involved no constitutional or statutory rule regarding collateral estoppel.

3. Petitioner's added sentence on the conspiracy count was permissible because conspiracy is a separately punishable offense. *Pinkerton* v. *United States*, 328 U.S. 640; *Callanan* v. *United States*, 364 U.S. 587. As the court of appeals noted (Pet. App. A52; 340 F. 2d at 841), this was not a case where concerted action was necessary for completion of the substantive crime. *United States* v. *Center Veal & Beef Co.*, 162 F. 2d 766, 770 (C.A. 2).[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1965.

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[2] Although the question is not separately presented, petitioner also appears to be contending that the evidence was insufficient to sustain his conviction on the conspiracy count. See Pet. 21, 25. That question is clearly inappropriate in a proceeding under 28 U.S.C. 2255.

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